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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

WAYNE PHILLIP CRUMP, JR.,

Defendant and Appellant.

E069142

(Super.Ct.No. FVI17000712)

OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed with directions.

Steven S. Lubliner, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Andrew Mestman and Susan Elizabeth Miller, Deputy Attorneys General, for Plaintiff and Respondent.

Following an attack on the victim, defendant and appellant Wayne Phillip Crump was convicted of assault by means of force likely to cause great bodily injury (Pen. Code,¹ § 245, subd. (a)(4)), misdemeanor battery (§ 242), and three “prison priors” arising out of felony convictions in other cases for which he served prior prison terms (§ 667.5, subd. (b)). He was sentenced to the upper term of four years for the assault, 365 days as to the misdemeanor battery to be served concurrently, and three years for the prison priors to run consecutively.

On appeal, defendant argues that the evidence is insufficient to support the conviction he used sufficient force to come within section 245. He also urges that the trial court erred with respect to sentencing on the misdemeanor battery count and in calculating the number of days of presentence and conduct credits to which he is entitled. We affirm the conviction on the section 245 count. The People concede, and we agree, that the trial court erred with respect to the sentencing on the misdemeanor battery conviction and credit calculations. We modify the sentence accordingly.

BACKGROUND

Not long after midnight on a Thursday morning in March 2017, the victim met up with her friend and defendant. They went to her friend’s home where defendant fell asleep alone on the living room floor. When he woke up later that morning, he was woozy and felt as though something was not right with his anal area. He thought he may have been sexually assaulted but did not mention his suspicions to anyone. Defendant,

¹ All further statutory references are to the Penal Code unless otherwise noted.

the victim, and the friend spent the rest of Thursday together. They took a trip to West Covina and returned to the friend's house around midnight. The friend then told defendant that the victim was a man and he was waiting for defendant to go to sleep. Defendant recalled the physical sensations he experienced when he woke up that morning and felt disgusted and angry. He tried to keep his composure because he wanted more information to determine whether the victim was male or female.

While the victim was out in the garage finishing a cigarette, defendant went to the friend's bedroom to ask again about the victim's sex. The friend repeated that the victim is a man. The victim appeared in the bedroom doorway and started taunting defendant to the effect that something had happened to him when he was sleeping. When she turned to leave, defendant came up behind her and punched her with a closed fist on the side of her face, then punched her in the face multiple times. The victim did not resist the attack, but fell to the ground. When she fell, defendant kicked her in the face. He also hit her on the head with a plastic basketball hoop and a picture frame. The friend, who had locked herself in her bedroom, heard the commotion and jumped out of the window to get help. She flagged down sheriff's deputies who were arriving at her home in response to a 911 call and unlocked the front door so they could enter her home.

When the front door opened, the deputies saw defendant standing inside with blood on his hands. The victim was on the floor directly behind defendant but got up immediately when the deputies walked in. Her entire face was bruised and swollen, and she had a laceration on her nose approximately two inches long.

The deputies arrested defendant. He was charged with a variety of offenses, including assault with force likely to produce great bodily injury (§ 245, subd. (a)(4)) and battery with serious bodily injury (§ 243, subd. (d)). The information also alleged defendant had served six prison priors. (§ 667.5.) After trial by jury, defendant was convicted of assault with force likely to produce great bodily injury in count 2 (§ 245, subd. (a)(4)), and misdemeanor battery, as a lesser included offense in count 3. The court subsequently found the prison prior allegations to be true. Defendant was sentenced to an aggregate term of seven years in prison and appealed.

DISCUSSION

Defendant raises three issues. One concerns the sufficiency of the evidence to support the conviction for violation of subdivision (a)(4) of section 245. The other two concern sentencing for the misdemeanor battery conviction and the calculation of credits. We will affirm the conviction and order modifications of defendant's sentence.

1. Sufficiency of the evidence to support the conviction for use of force likely to produce great bodily injury

Defendant contends that the evidence does not support the jury's conclusion that the force he employed against the victim was likely to produce great bodily injury. We disagree.

Our review of any claim of insufficiency of the evidence is limited. Our task is to consider the entire record in a light most favorable to the judgment to determine whether it discloses substantial evidence such that a trier of fact could find the defendant guilty

beyond a reasonable doubt. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.) Evidence is substantial if it is reasonable, credible, and of solid value. (*Ibid.*) Weighing evidence, assessing credibility, and resolving conflicts in evidence and in the inferences to be drawn are in the exclusive domain of the trial court. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

To obtain a conviction for a violation of subdivision (a)(4) of section 245, the People must establish beyond a reasonable doubt that defendant committed an assault upon the person of another by any means of force likely to produce great bodily injury. Great bodily injury is injury to the body that is significant or substantial, not insignificant, trivial, or moderate. (*People v. McDaniel* (2008) 159 Cal.App.4th 736, 748.) Actual injury, however, is not required. Rather, the statute is aimed at punishing an assault undertaken with sufficient force that it could likely produce great bodily injury. (*Ibid.*)

The issue whether the force used against a victim was likely to produce great bodily injury is a factual one to be resolved by the factfinder based on all of the evidence, including, but not limited to, the injury inflicted. (*People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1066.)

In this case, defendant admitted that he “snapped” when the victim began taunting him. He punched and kicked the victim in her face and hit her with a plastic basketball hoop and a picture frame. When the sheriff’s deputies arrived, the victim’s face was bloody, swollen, and bruised. She also had sore ribs and, since the assault, has been suffering from headaches. Those facts lend sufficient support to the jury’s conclusion

that defendant used force likely to produce great bodily injury when he assaulted the victim.

Defendant's insufficiency of the evidence contention is bottomed on the notion that, whenever a victim who is completely defenseless does not suffer significant or severe injuries, the only rational conclusion is that the defendant could not have used force likely to cause great bodily injury. He argues he could not possibly have used sufficient force to cause significant or severe injury because, even though the victim in this case did not fight back or otherwise resist the assault, she came away with only minimal injuries, albeit unpleasant and unwelcome ones. In support of the premise that the victim's injuries were not significant, he points to the jury's decision to acquit him of the charge of battery with serious bodily injury and to instead find him guilty of simple battery.

Defendant does not cite, and we have not found, authority to support the notion that the nature and extent of a victim's injuries may be dispositive of the sufficiency of force issue as a matter of law. The case he cites, *People v. Wells* (1971) 14 Cal.App.3d 348, 358, does not stand for that proposition. That opinion simply recognizes that, although section 245 may be violated without infliction of injury, any physical harm that does occur is proper fodder for consideration by the factfinder when deciding whether a defendant used force likely to cause great bodily injury. (*Wells*, at p. 358.) Here, the jury reasonably found that punching and kicking the victim in the face and hitting her with objects were actions likely to produce great bodily injury.

Accordingly, in viewing the record in a light most favorable to the judgment, we find there was sufficient evidence to support the conviction for violation of subdivision (a)(4) of section 245.

2. *Sentencing on the misdemeanor battery conviction*

Defendant was charged with battery with serious bodily injury (§243, subd. (d)) but was found guilty of the lesser included offense of simple battery (§ 242). On appeal, defendant argues, and the People concede, that the trial court erred in sentencing defendant to 365 days instead of a maximum of six months and in failing to stay that sentence, which was ordered to run concurrently with the term imposed for using force likely to cause great bodily injury. We agree.

Section 243 provides that the term of imprisonment for simple battery may not exceed six months in a county jail. (§ 243, subd. (a).) Section 654 provides that a criminal act that is punishable in different ways by different provisions of law must be punished under the provision that provides for the longest potential term of imprisonment. (§ 654, subd. (a).) In no event may an act be punished under more than one provision. (*Ibid.*) Section 654 also applies to an indivisible course of conduct committed pursuant to the same criminal intent or objective. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

A sentence imposed in violation of section 654 is unauthorized. (*People v. Le* (2006) 136 Cal.App.4th 925, 931.) An unauthorized sentence may be corrected on

appeal whether or not the defendant raised the issue in the trial court. (*People v. Smith* (2001) 24 Cal.4th 849, 852 (*Smith*).)

In this case, defendant was convicted of simple battery and, therefore, his sentence should have been six months at most, not 365 days as ordered. (§ 243, subd. (a).) And, because the battery was an indivisible part of defendant's assault on the victim for which he was sentenced to four years in prison, the sentence for simple battery must be stayed in accordance with section 654. The sentencing minute order and abstract of judgment must be modified to reflect a six-month term imposed for the violation of section 242 in count 3, and it must be stayed pursuant to section 654.

3. Credits

Defendant argues and the People concede, that the trial court miscalculated his presentence custody and conduct credits. They are correct.

Section 2900.5 provides that defendants are to be given credit against their term of imprisonment for time spent in custody from the day of arrest to the day of sentencing. (§ 2900.5, subd. (a).) Section 4019 allows defendants to earn conduct credits at the rate of two days of credit for every two days of custody. (§ 4019, subs. (b), (c) & (f).) An erroneous calculation of credits resulting in an unauthorized sentence is not forfeited by failure to object and may be corrected on appeal. (*Smith, supra*, 24 Cal.4th at p. 852; *People v. Guillen* (1994) 25 Cal.App.4th 756, 764.)

Here, the trial court awarded 189 days of custody credit but, by the time of sentencing, his actual time in custody was 190 days, March 10, 2017 to and including

September 15, 2017. He is, therefore, entitled to an additional day of presentence credit. The miscalculation of actual time in custody also resulted in 188 days of conduct credits. The correct award of conduct credits based upon 190 days of custody is 190. Defendant is, therefore, entitled to an additional day of presentence credit and two additional days of conduct credits. The minute order and abstract of judgment must be modified to show defendant's entitlement to 190 days of custody credit and 190 days of conduct credit.

DISPOSITION

The clerk of the Superior Court of San Bernardino County is directed to amend the sentencing minute order and abstract of judgment to: (1) reflect a six-month sentence for the violation of section 242 stayed pursuant to section 654; and (2) reflect custody credits of 190 days and conduct credits of 190 days, for a total of 380 days of credit.

As modified, the judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

RAPHAEL
J.